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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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DERICK ORTIZ, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED

v.

SIG SAUER, INC.

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* 19-cv-1025-JL
* February 24, 2020
* 3:03 p.m.
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Plaintiff:

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Benjamin T. King, Esq.
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For the Defendant:

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Benjamin B. Folsom, Esq.
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Court Reporter:

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Official Court Reporter
United States District Court
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1 P R O C E E D I N G S

2 THE CLERK: The Court has before it for
3 consideration this afternoon a motion hearing in civil
4 case 19-cv-1025-JL, Ortiz versus Sig Sauer,
5 Incorporated.

6 THE COURT: All right. We're here for a
7 motion to dismiss based on standing and sufficiency both
8 of the allegations and of the class definitions.

9 Why don't counsel identify themselves. We'll
10 just go right across my right, your left. Go ahead.

11 MR. FOLSOM: Your Honor, Ben Folsom on behalf
12 of the defendant, Sig Sauer.

13 I'm here with my co-counsel who has been
14 admitted pro hac vice, Robert Joyce.

15 And Steve Chaucer and Tim Lachance are both
16 here from Sig Sauer as well.

17 THE COURT: Welcome.

18 MR. JOYCE: As Mr. Folsom indicated, Robert
19 Joyce.

20 THE COURT: You'll be arguing, Mr. Joyce?

21 MR. JOYCE: And Mr. Folsom will be making part
22 of the argument.

23 THE COURT: Great.

24 MR. JOYCE: We'll try to identify who's
25 arguing what, but thank you for the opportunity to

1 appear here today, your Honor.

2 THE COURT: Oh, of course. It's our job.

3 MR. MARCHESE: Good afternoon, Judge. I'm
4 Joseph Marchese on behalf of the plaintiff.

5 MR. KING: Benjamin King on behalf of the
6 plaintiff, your Honor.

7 THE COURT: It's good to see you, Mr. King.

8 All right. Let's proceed. You can -- and
9 listen, there's several issues. I'll let you decide,
10 you're free to address any issues you want. And ones
11 they don't address orally, if you want to talk about
12 them orally you may do that, but I'll leave it up to
13 you. I'm happy to listen.

14 MR. JOYCE: Your Honor, I will try to cover
15 the waterfront on certain issues, you know, maybe from a
16 thousand feet relying on the papers, but I like to give
17 the Court an opportunity to question counsel to the
18 extent you have something in particular on your mind.

19 THE COURT: Understood. I am familiar with
20 all your papers and read the cases involved.

21 MR. JOYCE: Thank you.

22 Okay. By way of orientation, your Honor, the
23 plaintiff, Derick Ortiz, brings a nationwide class in
24 Arizona and New Hampshire subclass claims on behalf of
25 all consumers who purchased Sig's P320 model pistols.

1 THE COURT: You know what? Let me stop you.
2 One thing. I need to say this before I forget.

3 As I was preparing for this for, you know,
4 it's been a slow process, several weeks now, but
5 yesterday more intense, I realized that I purchased a
6 Sig Sauer pistol two Christmases ago as a gift, and I
7 thought, this is the same weapon. I thought it was. It
8 turns out it was a P226.

9 MR. JOYCE: No, that's a completely different
10 model.

11 THE COURT: Right. It was a gift for my son.

12 Anyway, so you're on notice. If that bothers
13 anybody, you can raise it. I don't know why it would
14 bother anybody, frankly, but on recusal issues there's
15 circuit guidance. We're not supposed to just throw it
16 in your lap and force you to deal with it like that, but
17 this doesn't strike me as a recusal issue at all. But
18 for a brief moment I thought I might be a member of the
19 class and had a little crisis until I went and got the
20 firearm, looked at it closely, and it was a P226.

21 So just be advised. If anybody has any
22 problems with it, you can make it known at any point.

23 Go ahead.

24 MR. JOYCE: The plaintiff's proposed classes
25 are exceptionally broad but not quite that broad.

1 So again, by way of orientation, plaintiff
2 Ortiz brings nationwide class in Arizona, New Hampshire
3 subclass claims on behalf of all consumers who purchased
4 Sig Sauer's P320 model pistols, and they're alleging
5 that the pistols were defectively designed because they
6 can inadvertently discharge the round of ammunition if
7 dropped on the ground. Commonly known as a drop fire.

8 THE COURT: Yeah.

9 MR. JOYCE: Plaintiff asserts multiple fraud
10 and warranty claims despite, one, failing to plead that
11 his pistol has manifested the alleged defect. He didn't
12 plead it because it hasn't. His pistol did not draw
13 fire. Two, admitting that Sig Sauer has implemented a
14 fix, what the plaintiffs call a fix and admit in their
15 pleading is a fix, for the alleged drop-fire defect
16 through a free upgrade program that has been available
17 to Mr. Ortiz and all other P320 owners since August of
18 2017, and continues to be available to Mr. Ortiz and all
19 other owners of P320 pistols to this day.

20 And that is true whether the pistol was
21 transferred, you know, whether that person is an
22 original owner or a transferred owner, that upgrade
23 remains available to anyone in possession of a P320.

24 THE COURT: As a matter of -- two quick
25 questions about that. I'll interrupt you occasionally.

1 As a matter of logistics, that's just a matter
2 of shipping the -- do you bring it back to the --
3 logistically how does that work?

4 MR. JOYCE: It comes back to Sig here in New
5 Hampshire.

6 THE COURT: Like I just ship it back myself or
7 do I bring it back to the retailer?

8 MR. JOYCE: You can do either. You can do it
9 through a federal firearms licensee or you could ship it
10 back yourself, but the, you know, you've got to ship it
11 back unloaded obviously. Sig covers all of the costs of
12 the shipment to and from. So when we say no cost to the
13 consumer, we mean that, no cost to the consumer.

14 THE COURT: Second question.

15 MR. JOYCE: Yes.

16 THE COURT: Which is I think more germane.

17 Is there a way to -- has Sig ever quantified
18 the risk of a drop fire? Is there a way of quantifying
19 it and, you know, expressing it in terms of a
20 probability or a risk, and does that risk increase over
21 time with more use?

22 MR. JOYCE: Well, I would say my first answer
23 to that question is there's no risk if the plaintiff
24 availed themselves of the voluntary upgrade. And that's
25 an important point, you know, because you see some of

1 the case law that deals with, okay, you have an
2 unmanifested defect but is there a risk of future harm
3 or injury, and in this case not unless the plaintiffs
4 deliberately eschew the remedy that's available to them.
5 And under the case law you cannot basically self-impose
6 damages on yourself in order to create a claim that
7 doesn't otherwise exist.

8 THE COURT: For not availing yourself of
9 the --

10 MR. JOYCE: Of the remedy, correct.

11 Parenthetically plaintiff's counsel filed on
12 behalf of a different plaintiff, Mr. Gordon, a
13 materially identical class action in the United States
14 District Court for the Southern District of Texas, and
15 that's the Gordon v. Sig Sauer case, and that is before
16 Chief Judge Rosenthal.

17 That has gone through a motion to dismiss.
18 Chief Judge Rosenthal issued a decision, albeit under
19 different operable law --

20 THE COURT: I read it.

21 MR. JOYCE: -- looking at Texas law primarily.
22 That's where Mr. Gordon resides. She applied Texas law
23 to the various causes of action that correlate
24 specifically with Mr. Gordon's case.

25 As Mr. Folsom will be arguing today, the Court

1 should apply New Hampshire law to the warranty-based
2 causes of action. Mr. Folsom will be making that
3 argument.

4 Arizona, I should say, I misspoke, where Mr.
5 Ortiz resides.

6 In any event, the court there issued a
7 decision and the plaintiffs reacted to that decision by
8 filing this case within a week of that decision.

9 The plaintiffs have amended the complaint.
10 Sig believes that they haven't --

11 THE COURT: I'm sorry. What did you say about
12 within a week of the decision?

13 MR. JOYCE: Within a week of Judge Rosenthal's
14 decision in Texas, the plaintiff filed -- plaintiff
15 Ortiz filed this case.

16 Now, Mr. Ortiz is not Mr. Gordon. Same
17 plaintiff's counsel, however, filed -- reacted to that
18 decision by moving to start a separate action here in
19 New Hampshire. They are still maintaining the Texas
20 court action.

21 Just by way of a status update, the plaintiffs
22 have amended the complaint. Sig doesn't view that
23 complaint as solving the deficiencies that the judge
24 determined existed in the original filing and made a
25 motion to dismiss, and that remains sub judice, so the

1 parties are waiting to hear what Judge Rosenthal will
2 say about the amended complaint.

3 THE COURT: So you're handling that case in
4 Texas?

5 MR. MARCHESE: Yes.

6 THE COURT: That's interesting. So I'm just
7 -- the amendment is what interests me.

8 After a motion to dismiss you're permitted to
9 amend to cure whatever deficiencies led to the
10 dismissal?

11 MR. MARCHESE: During the hearing the judge
12 asked if I could put some finer points on some of the
13 details of the allegations. I told her that I could and
14 she gave me leave to amend so I did.

15 THE COURT: Sure.

16 MR. JOYCE: Certain of the claims were
17 dismissed with prejudice and certain without with leave
18 to amend.

19 THE COURT: Got you. All right.

20 MR. JOYCE: Okay. So we're here to talk about
21 Mr. Ortiz's case filed in New Hampshire of course, and
22 Sig believes that the Court should dismiss those claims
23 for multiple reasons. First, the plaintiff lacks
24 standing to assert individual claims because he hasn't
25 suffered any injury. Plaintiff's P320 pistol has not

1 manifested the alleged drop-fire defect and a free fix
2 is already available to him. Plaintiff also lacks
3 standing to represent consumers in the 49 states where
4 he does not reside, including New Hampshire consumers.

5 All of plaintiff's claims should be dismissed
6 on these grounds. There's no claim that plaintiff can
7 bring if he doesn't have the foundation of standing. He
8 doesn't have standing because he hasn't suffered an
9 injury that's cognizable under the law.

10 THE COURT: I'm curious about that whole --
11 that argument, only in the sense that -- the upgrade
12 argument, part of it I understand. And whether I accept
13 it, it makes sense to me, but the -- let's take that out
14 of it for a minute.

15 Isn't the law different for a product like
16 this? I mean, you say he hasn't suffered an injury yet
17 because there hasn't been a drop-fire incident. That's
18 not like some appliance that's not working correctly and
19 your not having suffered that inconvenience. It's a
20 life-threatening defect. Does a plaintiff really have
21 to suffer a drop fire before standing is conferred?
22 Again leaving out the whole upgrade argument, what do
23 you say about that?

24 MR. JOYCE: Well, I think if you compare it,
25 for example, to the Everett case involving plaintiffs

1 who claim the seatbelt buckles in vehicles they
2 purchased had a propensity to partially latch and
3 potentially provide insufficient restraint during a
4 crash, I think this case fits with Everett. I mean, if
5 those things happened, someone could get hurt, right?
6 If a gun drop fires -- and remember, there's a number of
7 things that have to happen for this firearm to drop
8 fire, including that the plaintiff just deliberately
9 eschewed the remedy that's available to him.

10 Secondly, he has to have a loaded -- has to
11 have a firearm with a round in the chamber, and then he
12 has to drop it, right? That's abuse of handling. He
13 shouldn't be doing that.

14 The warning in the Sig Sauer manual that comes
15 with this firearm has a big picture of a gun that's
16 dropped and discharging. You can see the blast right
17 outside the muzzle, and it says, warning, any firearm if
18 dropped can discharge.

19 THE COURT: Don't drop it.

20 MR. JOYCE: Don't drop it, right.

21 And the plaintiff says warranty claims,
22 misrepresentation claims, when we've got a big picture
23 half the size of the page in the warning manual that
24 says this is exactly what can happen if you drop a gun.

25 That notwithstanding, this gun did have a

1 vulnerability for a drop fire at a very particular angle
2 that wasn't addressed in the -- in all the U.S. testing
3 standards. There's about three or four predominant
4 standards that the industry tests firearms to when it's
5 looking for abuse of handling and that includes a drop
6 fire, and this angle that this firearm can be discharged
7 -- can discharge, it just wasn't covered. It wasn't
8 addressed by any of the existing standards, which then,
9 you know, begs the question, is that okay? Does that
10 mean that the standards should be improved? Sig didn't
11 want to have that discussion with folks and therefore
12 instituted -- although it met every U.S. standard at the
13 time it was manufactured and produced and sold, it
14 wanted to make sure that its customers had the best that
15 engineering could offer, and they made this upgrade
16 available and that does that.

17 And there's no dispute in this case, your
18 Honor, that that upgrade doesn't work, it doesn't do --
19 essentially it doesn't give the plaintiff the firearm
20 that he says he thought he was buying at the time that
21 he purchased it. That complaint is resolved by that
22 upgrade.

23 So the second -- so that's essentially the
24 standing. Oh, so we have the Everett case, your Honor,
25 and then I think there's also another case that I would

1 bring to the Court's attention, and that is the -- I
2 think there are three cases that you'd want to look at
3 that sort of create a spectrum. There's the Coghlan
4 case, the Everett case, and then the Rule case. And in
5 the Rule case, it's a little bit different than Everett
6 because in Everett there was a potential for human
7 personal injury involved in the event that there was
8 some future occurrence which hadn't happened yet.

9 In the Rule case, which is a First Circuit
10 case, remember that where -- to remind you, that's the
11 heartworm case, the medication for dogs.

12 THE COURT: Yes.

13 MR. JOYCE: The plaintiff's dog didn't suffer
14 any harm from the medication, didn't develop heartworm
15 while using it. Nonetheless, Rule filed a putative
16 class action on behalf of all dog owners who had
17 purchased the medication.

18 The First Circuit upheld the district court's
19 dismissal of Rule's complaint briefing that the
20 unfitness of ProHeart 6 lay in its potential for causing
21 harm to the dog. However, because plaintiff's dog did
22 not suffer any harm and there was no potential for
23 future harm given that the medication had already been
24 administered to plaintiff's dog, the plaintiff had not
25 suffered or sustained any compensable injury.

1 So going back to your original question, and
2 your Honor was careful to caveat to the question, if you
3 put aside the existence of the voluntary upgrade, and I
4 --

5 THE COURT: You don't think that's necessary.

6 MR. JOYCE: And I would say that would be a
7 mistake. That's a whole -- that's a lot to try to push
8 off the table. And it's really the voluntary upgrade
9 which is at the bottom of this because if you take a
10 step back from this action and look at it in its
11 broadest sense, they have eight causes of actions and
12 there's no there there. The beef, the book of hurts
13 that they come with, there's a remedy available for it.
14 So I think you don't want to answer that question
15 without regard to the existence of the voluntary
16 upgrade. I think it's a more complicated question
17 without that, but it is there.

18 The second basis for dismissal is that all of
19 plaintiff's warranty claims ignore that the warranties
20 that Sig Sauer offered was limited to repair or replace,
21 which he has eschewed, Mr. Ortiz. Had he pursued the
22 express warranty that was available to him, he would
23 have received the Voluntary Upgrade Program available
24 for all P320 owners which provides the product which
25 plaintiff and others' claims you bargained for.

1 Plaintiff does not have an implied warranty
2 claim as a matter of operable law, and here, your Honor,
3 that is Arizona law, and Mr. Folsom will be addressing
4 that choice of law issue, because he doesn't have
5 privity of contract with Sig Sauer. Under Arizona law
6 you don't have an implied warranty claim unless you have
7 privity of contract with the manufacturer.

8 Here the manufacturer is not the entity that
9 sold the firearm to Mr. Ortiz, and it was the FFL dealer
10 in Arizona. So he has no potential for an implied
11 warranty claim under Arizona law.

12 Similarly under the MMWA. MMWA is just a
13 federal statute that incorporates the state law. If you
14 have no state law claim, and he has, then Mr. Ortiz does
15 not for implied warrant, he has no MMWA claim.

16 THE COURT: Your co-counsel is going to be
17 addressing that Arizona law issue mostly?

18 MR. JOYCE: I will. I'm going to follow up in
19 more detail on this warranty claim. I have some case
20 law for --

21 THE COURT: Yeah, I was going to say I don't
22 remember seeing that in your brief at all, that whole
23 privity --

24 MR. JOYCE: We made the argument that he has
25 no warranty claim. We didn't focus I think as much as

1 we should have on Arizona law, and I have some cases
2 which I will give now to your Honor, and hopefully
3 someone will be taking that down so you don't have to
4 write it down, but we provided these cases to
5 plaintiff's counsel before the argument because we felt
6 that it would come up and in fairness wanted to provide
7 it to the plaintiffs, but I will give you those cites
8 now.

9 And you'd want to take a look, I think, your
10 Honor, at -- okay. The first case, which is a good --
11 provides a good summary of Arizona law on warranty is a
12 case called Chaurasia versus General Motors. That's at
13 212 Arizona 18 126 P.2d (sic) 165, 169 Arizona Court of
14 Appeals, 2006.

15 THE COURT: All right.

16 MR. JOYCE: The second case that is
17 informative and helpful on this issue is Flory versus
18 Silvercrest Industries, Inc., and that's 129 Arizona
19 574, 1981. The sub-cites there are 579 to 81. There's
20 also a P.2d cite, 633 P.2d at 388 to 90.

21 The third case that's worthwhile looking at is
22 Walsh versus Ford Motor Company, and that's 588 F.Supp.
23 1513 at 1527, D.D.C. 1984.

24 The next is Plagens versus National RV
25 Holdings Inc., 328 F.Supp. 2d 1068 at 1074. That's the

1 District of Arizona in 2004.

2 Finally, there's Haugland versus Winnebago,
3 and that is 327 F.Supp. 2d at 1092.

4 And if I could just talk for a little bit
5 about those. Since we're talking about this issue now,
6 I'll skip ahead and --

7 THE COURT: I'll let you talk about it, but I
8 want to be upfront with you. I'm not going to guarantee
9 I'm going to consider those cases. We've been working
10 on this for a while, and I'm not sure if I'm inclined to
11 reboot, but we have the cites and --

12 MR. JOYCE: They had been provided to
13 plaintiff's counsel before the hearing, your Honor.

14 THE COURT: Yeah. The problem is you didn't
15 provide it to the Court before the hearing and I've
16 already done a lot of work on the case and I have
17 another case to work on, too, so -- look, I might look
18 at it. I might not. What I'm trying to tell you is I'm
19 not making any promises.

20 MR. JOYCE: Okay. Understood, your Honor.

21 The argument is in the briefs, the argument
22 that --

23 THE COURT: I looked at the arguments in the
24 brief but not the privity argument.

25 MR. JOYCE: But that is part of operable

1 Arizona law, you know, to the extent that you find that
2 there is an implied warranty --

3 THE COURT: -- independent Arizona law outside
4 of cases you provided to find that privity argument that
5 you're making now, that's what you wanted me to do?

6 MR. JOYCE: I'm looking for you to take
7 judicial notice of Arizona law on the issue and have
8 provided some assistance to the Court in that regard
9 with those cites. That would be my response.

10 THE COURT: Thank you. All right.

11 MR. JOYCE: Okay. Going back to the outline
12 of the basis for dismissal, the unjust enrichment claim
13 should be dismissed because it's precluded by the
14 existence of a valid warranty.

15 Moving to the class, the plaintiff's
16 definition of the classes, the courts within the First
17 Circuit routinely hold that nationwide breach of
18 warranty, unjust enrichment, and fraud claims are
19 inappropriate for class treatment given differences in
20 state laws applicable to these claims and the
21 individualized nature of the claims, and therefore
22 plaintiff's nationwide class definitions should be
23 stricken.

24 The plaintiff's solution to that lack of
25 commonality in the briefing is really threefold. One is

1 that we shouldn't be talking about that now at a motion
2 to dismiss. We should wait until the class
3 certification. But when the case law instructs I
4 believe, you know, courts that have looked at these
5 issues in terms of the efficient way to handle putative
6 class actions is that if they don't make any sense on
7 their face, you shouldn't leave them in the case because
8 it complicates discovery in the case. The lawyers will
9 argue about whether the discovery should pertain to a
10 potential nationwide class or be limited to the issues
11 associated with the narrower class. It makes it a much
12 more inefficient litigation.

13 And I don't think the plaintiffs here have
14 made really any attempt to tailor their classes to
15 anything that makes sense in this case, including both
16 on the commonality issue, your Honor, and also in terms
17 of the definitions of the classes. They brought this
18 class purportedly on behalf of everyone who has ever
19 purchased a 320, and by definition that would include
20 people that already have an upgrade, people that
21 purchased their firearms after the -- essentially the
22 upgraded product was a product that was originally sold
23 after 2017. All of those people would, you know, as a
24 technical matter be part of the classes that the
25 plaintiffs have brought this case on behalf of, and that

1 just doesn't make any sense.

2 The plaintiffs bring a New Hampshire Consumer
3 Protection Act claim, and again Mr. Folsom will be
4 dealing with that claim, but that claim fails for the
5 simple reason that Mr. Ortiz is not protected under that
6 statute. The breach is where the product was taken, not
7 where it was sold from.

8 THE COURT: Yeah. It seems to be consistent
9 with New Hampshire law.

10 MR. JOYCE: There's a couple other arguments.
11 We moved through -- and your Honor was obviously
12 interested in a few things so I moved into sort of the
13 core of the argument on some of the things that I
14 outlined, so I'm just going to skip to a few points that
15 I think I want to emphasize --

16 THE COURT: Sure, that's fine.

17 MR. JOYCE: -- and then you'll be glad to know
18 I will sit down.

19 THE COURT: I'll hear any argument that you
20 want heard.

21 MR. JOYCE: Okay. I wanted to talk a little
22 bit on the standing front. The plaintiffs talk about
23 diminished resale value due to the alleged defect of --
24 due to the alleged drop-fire defect, which, your Honor,
25 to my mind is not a plausible argument on its face

1 because you're talking about -- he can't legally eschew
2 the remedy, so he has to be saying that basically the
3 firearm that I thought I was getting, which is now
4 available to him through the voluntary upgrade remedy,
5 somehow has a decreased market value if I want to go to
6 sell it.

7 And what would be the basis for the decreased
8 market value? It can't be anything related to the
9 drop-fire issue because that's resolved. He's admitted
10 that that's resolved. So it would have to be -- any
11 diminished resale value has to be for some other reason,
12 but if it's for some other reason, then he hasn't proved
13 his case. The diminished resale value has to relate to
14 the defect that he's complaining over. If not, then he
15 has to prove up something else, and that's not in his
16 complaint. He speaks only about this drop-fire issue
17 which is resolved.

18 THE COURT: I'm not even sure if this is the
19 plaintiff's argument. I have a couple questions about
20 it, but I mean just the idea -- I don't know, you buy an
21 automobile, and there's a recall, and you go to get the
22 recall done and then you go back to the dealer, they
23 implement the recall repair, but isn't there a taint?
24 Isn't there some kind of taint that buyers and sellers
25 recognize even if the recall repair was successful,

1 fully effective? Isn't there some sort of taint that
2 affects the value of a product?

3 MR. JOYCE: I don't think so. I'm not going
4 to agree with that, no. I mean, here you have a
5 superior product. You know, it goes above and beyond
6 any existing standard in the U.S. Not only does he have
7 the product that someone might have hoped or expected to
8 get, he's got a better product.

9 So I don't think -- that would be a
10 speculative theory, and I don't even think he has a
11 foundation to launch even on an attack on the pleadings
12 basis, which I understand that's where we are. He
13 doesn't allege anything that gives him the standing to
14 make that claim.

15 And if you take a look, for example, your
16 Honor, at the Toyota case which is in the briefs, only
17 plaintiffs who pled something more than alleged
18 diminished value could proceed. The something more
19 included having sold or traded in vehicles at a loss due
20 to depressed resale values, filing recalls, and
21 publicized alleged incidents.

22 In this case the plaintiff doesn't allege that
23 he ever resold the firearm at a loss, that he ever
24 attempted to resell the firearm and learned that there
25 was a loss attributable to this issue in the

1 marketplace.

2 THE COURT: That's true.

3 MR. JOYCE: He hasn't made any concrete
4 allegation to support the diminished value theory, and I
5 think that the case law is clear if you take a look at
6 the standing cases, including Toyota, including the
7 Kerin versus Titeflex Corp. case that we discussed,
8 which is that CSST case, I think he has to plead
9 something more to proceed under that theory, and I don't
10 think you can find any allegation in the complaint that
11 provides the necessary factual predicate to supply that
12 something more.

13 THE COURT: Tell me a little bit about
14 this repair. I understand that it's a two-component
15 deficiency that the upgrade repaired. Trigger weight
16 and sear, right?

17 MR. JOYCE: Right.

18 THE COURT: Talk to me about sear, if you have
19 an understanding of it. I mean, a mechanical
20 understanding of it. If you don't, I don't want to put
21 you in that position. But if you do, could you talk
22 about that a little bit?

23 MR. JOYCE: Well, you know, the thing about a
24 drop fire is it says, well, you said the firearm
25 wouldn't discharge without a trigger pull. In a

1 drop-fire situation the trigger is actually pulled.

2 It's gravity that's discharging the firearm.

3 In a drop fire and in inertia, the physics are
4 the weight is your enemy. Those parts that weigh
5 heavier have greater force than velocity and therefore
6 can lead to the trigger being pulled, you know,
7 unintentionally. Although the person who owns the
8 firearm certainly didn't intend for that discharge, but
9 the gun doesn't know any better because the trigger got
10 pulled.

11 So the lighter weight helps on the physics of
12 the fall and the sear also -- the difference in the sear
13 makes it far less likely that you will have a drop fire.

14 So there's the weight change for the trigger,
15 there's a weight change for the -- striker safety is
16 also made of lighter material, and there's another --
17 Steve Chaucer is here and he can remind me, but I think
18 there's another notch also on the sear which provides
19 basically belts and suspenders so that that trigger
20 doesn't release from the sear with the inertia of a
21 drop.

22 THE COURT: I see.

23 MR. JOYCE: So you basically have lightened
24 parts, a couple of lightened parts, and you also have
25 another notch on the sear which if it skips off of one,

1 it's going to hit that second notch.

2 THE COURT: In terms of trigger pull weight,
3 if that's the right term --

4 MR. JOYCE: Well, it's the weight of the
5 trigger itself. It's not the --

6 THE COURT: The pull weight is the actual
7 weight of the trigger.

8 MR. JOYCE: Well, the pull weight is the
9 pounds per square inch required to pull the trigger
10 back. Here they actually -- the part, the trigger has
11 less weight to it so it's --

12 THE COURT: The trigger weighs less, not the
13 amount of force required to pull the trigger but the
14 trigger itself.

15 MR. JOYCE: Correct. Right, right.

16 So with the drop you get -- when the energy is
17 supplied by the drop, the heavier the part is the more
18 likely that is to move to a point of discharge, and when
19 you lighten that up in combination with the other fixes,
20 it was a good engineering project. They solved the
21 vulnerability. And to Sig's great disappointment, we
22 got sued in this case anyway and we don't think we
23 should have been and that's why we made a motion to
24 dismiss.

25 THE COURT: Understood. Understood.

1 MR. JOYCE: I am going through -- I think one
2 of the other issues that I did not address is on the
3 fraud. You know, obviously the plaintiff doesn't
4 address the necessity of individualized reliance
5 increase with respect to his fraud-based claims. States
6 have different laws in terms of reliance and other
7 issues on fraud claims. It makes it impossible to
8 maintain, you know, a nationwide class action.

9 In the Texas action, reviewing material,
10 identical class-based fraud claims found that such
11 claims would require resolving whether each class member
12 when purchasing a P320 relied on the statements made in
13 Sig Sauer's marketing campaigns in deciding to purchase
14 their P320 pistol.

15 So really I think that was the point that --
16 the actual point that I was trying to make is that the
17 individualized reliance associated with fraud claims
18 requires you to dive down into the individualized facts
19 of each purchaser and therefore lacks the commonality
20 there.

21 The court in Texas struck down those fraud
22 claims as a matter of law and did not give leave to
23 replead those claims, your Honor, but the plaintiffs
24 come back with the same request for class certification
25 of fraud claims here in this court.

1 As a technical matter, your Honor, on the
2 warranty, I mentioned that the plaintiffs were quick to
3 file the New Hampshire complaint after the Texas
4 decision and they were so quick that they got their
5 notice backwards. They filed a lawsuit and then Sig was
6 notified of the loss and that's a technical basis for
7 the dismissal of warranty. Sig understands that if it's
8 dismissed on that technical basis they can come back and
9 refile an action getting it right, so we're emphasizing
10 the merits-based arguments to the Court but that
11 technical deficiency does exist as well.

12 Mr. Folsom is going to argue two things, your
13 Honor, on his choice of law, which is the reason why
14 Arizona law is going to apply to Mr. Ortiz's claims, and
15 then the second is the New Hampshire consumer fraud
16 statute.

17 Thank you.

18 THE COURT: Why don't we do this. Rather than
19 address the New Hampshire CPA and the choice law now,
20 why don't we let plaintiff's counsel respond to the
21 arguments you've made.

22 MR. JOYCE: Okay.

23 THE COURT: And then we'll go back.

24 MR. MARCHESE: Thank you, your Honor.

25 THE COURT: Yep.

1 MR. MARCHESE: So this is a putative class
2 action concerning a dangerous gun safety issue.
3 Specifically, the case concerns a design defect with the
4 defendant's P320 pistols which were first sold in 2014.

5 As originally designed, every P320 pistol has
6 a drop-fire defect, meaning that the P320 is unduly
7 prone to firing when dropped on the ground.

8 The cause of that defect is that the P320 was
9 originally designed with a trigger mechanism that was
10 too heavy, which defense counsel alluded to earlier.

11 Despite that drop-fire defect, defendant
12 represented to consumers on its website and in its other
13 marketing materials that the P320 was drop safe and it
14 would not fire unless you want it to.

15 Those claims were made from 2014 through at
16 least 2017 and they were made including as part of the
17 defendant's safety without compromise marketing
18 campaign, but those representations about drop safety
19 were false.

20 The plaintiff bought his P320 pistol for about
21 \$500 from a firearms dealer in Arizona in September --

22 THE COURT: When you say false, let me just
23 ask you though, it met all applicable standards, didn't
24 it? It's just that -- that's what defense counsel
25 argues. Is he wrong about that?

1 MR. MARCHESE: Defense counsel argued that the
2 gun had a vulnerability.

3 THE COURT: A vulnerability not addressed by
4 the applicable standard.

5 MR. MARCHESE: But it was addressed by the
6 Army when the Army told them that the gun was defective
7 in 2016 because of a drop-fire defect. So it was
8 defective enough for the Army to tell them that if they
9 didn't fix the drop-fire defect, they weren't going to
10 get the contract with the military.

11 THE COURT: Yeah. All right.

12 MR. MARCHESE: And I just think that civilians
13 should just get the same sort of benefit that our men
14 and women in uniform were getting when the Army had its
15 weight behind that statement that the gun was defective.

16 So prior to the plaintiff's purchase he read
17 on the defendant's website and in one of the defendant's
18 marketing brochures that the gun was drop safe; that it
19 wouldn't fire unless he wanted it to. And he relied on
20 those claims in deciding to purchase the weapon, and he
21 alleges that he would not have bought it had he known
22 that those claims were not true or he wouldn't have paid
23 as much. So effectively that he was overcharged for the
24 defective pistol, and he's bringing his suit for money
25 damages and injunctive relief.

1 I want to go back and talk about that contract
2 with the Army. So Sig won a contract with the
3 Department of Defense to make a military version of the
4 P320 in 2016. The military version of the pistol used
5 the same design as the civilian versions that our case
6 is about with the heavier trigger mechanism, and during
7 testing in April of 2016 the Army confirmed that the
8 pistols fired unintentionally when dropped, which the
9 Army deemed to be a deficiency with the guns.

10 The Army traced the deficiency to the issue
11 with the trigger and directed Sig to modify the trigger
12 mechanism to correct the deficiency. So there's no
13 question that the defendant had actual notice of that
14 defect back in April of 2016.

15 Sig replaced the heavy triggers with a lighter
16 trigger mechanism on the military version of the
17 pistols, but it did not change anything on the civilian
18 version of the P320s for more than one year, and did not
19 offer to do so either.

20 Sig admits that it then conducted additional
21 testing after hearing from the Army and their testing
22 confirmed drop-fire discharges with the P320. Sometime
23 in late 2017 Sig then changed the design of the civilian
24 P320 by replacing the original heavy trigger with a
25 lighter trigger mechanism, but before that change was

1 made Sig had sold more than 500,000 defective pistols to
2 consumers.

3 Then in August of 2016 Sig announced the
4 so-called voluntary upgrade for its P320 pistols. As
5 part of that program, which sometimes takes up to four
6 to six weeks, Sig installs the lighter trigger and an
7 improved sear to address the drop-fire safety issue, but
8 Sig did not provide effective notice of the program to
9 its consumers and it misrepresented the very nature of
10 the program, sometimes expressly stating that the guns
11 were safe in their original design and that the upgrade
12 had nothing to do with drop safety.

13 And as a result, there are still hundreds of
14 thousands of these defective P320s out on the streets in
15 consumers' hands.

16 THE COURT: Doesn't that overstate it when you
17 say that it doesn't have anything to do with drop
18 safety? I mean, it wasn't emphasized in those
19 materials, but nothing to do?

20 MR. MARCHESE: I believe in our complaint we
21 actually have the Q&A, and the allegations that we made
22 I think quote defense executives and employees talking
23 about how the voluntary upgrade has nothing to do with
24 drop safety. Nothing to do.

25 I'd like to move to the standing argument.

1 So plaintiff Ortiz has sufficiently alleged an
2 injury in fact that confers Article 3 standing for his
3 claims. He's alleging a design defect that's inherent
4 in every P320 that was made pursuant to the original
5 design, and he alleges a resulting economic injury for
6 himself and on behalf of the putative class members.

7 He paid for a gun that was represented as drop
8 fire but instead received a gun with a drop-fire defect
9 and that's quintessential economic harm, your Honor,
10 suffered at the point of purchase.

11 The plaintiff and the putative class members
12 can pursue money damages because they received less than
13 what they bargained for at the time of purchase and were
14 overcharged as a result, and First Circuit case law
15 holds that this type of economic damage can serve as the
16 basis for Article 3 standing. And we cited the
17 Gustavsen case, 903 F.3d 1, and the Nexium Antitrust
18 Litigation case, 777 F.3d 9, in support of that
19 proposition.

20 Moreover, plaintiff Ortiz alleged damages in
21 the form of diminished resale value among other things,
22 and we talked about that -- or Sig's counsel talked
23 about that. Here diminished resale value damages are
24 plausible because there's a very real likelihood that a
25 defective P320 will discharge a round unintentionally

1 when dropped, and also because of the publicized
2 incidents of severe physical injury that have occurred
3 due to the defect, and we've alleged those in the
4 complaint in paragraphs 27 to 31. So I do think it's
5 plausible that there's a taint on the P320s at resale,
6 especially when you're hearing about busted femurs and
7 busted legs and broken bones that have occurred because
8 of these drop-fire incidents. So we've made those
9 allegations in the complaint, and I think we have
10 alleged sufficiently that the diminished resale value
11 damages are plausible.

12 And, you know, one other thing I would say.
13 We're at the motion to dismiss stage, and I think what
14 you and defense counsel were talking about earlier about
15 diminished resale value may have actually been getting
16 into some issues of fact that wouldn't really be --

17 THE COURT: That go beyond the four corners?

18 MR. MARCHESE: Yeah, that wouldn't be
19 appropriate to decide at the motion to dismiss stage. I
20 would like some discovery on that if your Honor was
21 coming out on that issue that way.

22 THE COURT: To be honest with you, I was
23 really more -- I thought I was focused on the pleadings
24 and I was really sort of looking at it in your favor.
25 Just, you know -- he's basically saying that it's

1 impossible given what the facts are that there could be
2 resale reduction, value reduction, and I understand
3 given the possibility that on your pleadings I thought
4 maybe there could.

5 MR. MARCHESE: I agree.

6 THE COURT: But I don't know if it gets into
7 the fact of beyond the four corners. It's more of a --
8 here's the thing, I draw inferences in your favor at
9 this point. That's the law.

10 MR. MARCHESE: Yes, and we'll take that
11 inference.

12 So, now, the defendant made the same Article 3
13 standing arguments in his motion to dismiss in the
14 Gordon case, which is the case pending in the Southern
15 District of Texas, but those arguments were rejected by
16 the court down there.

17 The cases that defendant cited on this point,
18 they either cut our way, they're not relevant, or
19 they're out-of-circuit cases that are not binding.

20 So the Everett case that my adversary
21 discussed, it doesn't even involve an allegation of a
22 design defect, your Honor. Rather, the allegations in
23 that case were based on a manufacturing defect with some
24 seatbelts. And in Everett the seatbelts never
25 malfunctioned, but here we allege right in the four

1 corners of the complaint that there have been numerous
2 incidents where the P320 users were shot and injured as
3 a result of a drop-fire incident. So the alleged defect
4 here has very much been manifested in that way, and we
5 have a real safety issue on our hands.

6 And the Coghlan case, that cuts in our favor.
7 That was a case about someone who was promised a
8 fiberglass boat, and instead they got fiberglass in a
9 wood boat. Well, my client was promised a drop-safe
10 gun, and instead he got a drop-fire defective gun. So
11 that cuts in our favor.

12 Sig also cited to --

13 THE COURT: Let me ask you a question, though.
14 Why not take advantage of the upgrade? If the upgrade
15 doesn't cure the defect, it doesn't undermine your
16 position even from a litigation standpoint. I mean, why
17 not get it? Why ever possess a less safe firearm?

18 MR. MARCHESE: What I can tell you is that my
19 client, you know, he was outraged about the fact that --

20 THE COURT: Yeah, I don't know. I'm not big
21 on outrage as a means for sustaining litigation. I'm
22 not trying to be --

23 MR. MARCHESE: And I'm going to get to the
24 voluntary upgrade and why it doesn't root out any claims
25 shortly.

1 I just want to talk about the Rule case, which
2 is a First Circuit case, the heartworm medicine for the
3 dogs. That case is distinguishable. There the court
4 based its ruling that the plaintiff didn't have standing
5 on the fact that she had used up all the pet medicine at
6 issue and faced no continuous risk of harm or diminished
7 resale value. And that's different from our case where
8 the plaintiff alleges not only that he overpaid for the
9 pistol in the first instance, but also that he's harmed
10 in the form of the diminished resale value. So we think
11 that, you know, the Court can draw a distinction in our
12 favor for the Rule case.

13 For the first time in its reply brief the
14 defendant cited the Kerin case, also a First Circuit
15 case. That case was about a manufacturing defect with
16 outdoor stainless steel piping that provided gas to an
17 outdoor fire pit in the plaintiff's home, and the claim
18 was that the piping could fail if it was hit by
19 lightning and the plaintiffs sued for economic damages.
20 The court dismissed for lack of standing because the
21 risk of future harm, i.e., a lightning strike, was too
22 remote and speculative.

23 But again, this case is distinguishable from
24 the Kerin case because the drop-fire design defect is
25 manifest in every P320 pistol as originally designed.

1 We're not talking about lightning strikes here, your
2 Honor. I mean, we have allegations in the complaint of
3 numerous incidences where people are getting shot by
4 these guns through a drop fire. It's not like winning
5 the lottery or getting hit by lightning.

6 Here the complaint seeks economic damages and
7 sufficiently alleges actual publicized injuries
8 resulting from the drop-fire incidents, thereby
9 demonstrating that the risks here are real and not
10 speculative like a lightning strike.

11 And to your point, the plaintiff's claims are
12 not muted by the Voluntary Upgrade Program, and the
13 plaintiff alleges that the Voluntary Upgrade Program
14 would not make him whole. It simply does not compensate
15 him for lost use of the firearm during the upgrade
16 period, which I told you we have information that that
17 sometimes takes four to six weeks. It does not
18 compensate for diminished resale value. It does not
19 provide full compensation for the benefit of bargain
20 damages. And the plaintiff asserts legal claims that
21 provide for remedies that go beyond what the so-called
22 Voluntary Upgrade Program provides, including statutory
23 damages, punitive damages, and trebling damages. We
24 also seek some injunctive relief that the Voluntary
25 Upgrade Program does not address. So the voluntary

1 upgrade does not mute any of the plaintiff's claims.

2 THE COURT: Your treble damages, is there any
3 -- besides New Hampshire Consumer Protection Act, are
4 there any other trebling statutes?

5 MR. MARCHESE: The one I just talked about,
6 that was the one that I was thinking about. I can't
7 think of any other standing here right now, but, you
8 know, whatever is in the complaint is in the complaint.

9 THE COURT: Is there any difference between an
10 inherent design defect and a potential defect in, you
11 know, the entirety of the production lot of a product
12 that may or may not ever manifest itself? What's the
13 difference?

14 MR. MARCHESE: Well, I mean, what we're
15 talking about here -- and maybe one of the ways we can
16 talk about that is that Everett case where there was a
17 manufacturing defect with some seatbelts, but I think in
18 the course of ten years not one seatbelt had
19 malfunctioned. That's not what we're talking about
20 here. And if I was to amend the complaint --

21 THE COURT: We've got malfunction, but we just
22 don't have your client's malfunction. But we have
23 malfunction.

24 MR. MARCHESE: Oh, yeah, we have malfunction
25 and we have maiming happening. So the result in the

1 defect is very, very real, you know, and the notice of
2 the defect has been insufficient, not clear, not
3 conspicuous. It's actually -- you know, the defect has
4 really been, you know, has really been concealed
5 somewhat by the defendant's statements. I think even
6 the CEO came out and said, oh, there have been no
7 reported incidents of the -- of a drop fire in the
8 market. I mean, that's, you know, that's outrageous.

9 THE COURT: Well, it's outrageous -- it comes
10 down to, I'm assuming -- you know, I'm trying to not
11 assume the worst here. I'm assuming that comes down to
12 a different definition of what actually constitutes drop
13 fire, right? That's the only way I can --

14 MR. MARCHESE: Look, I don't know what the CEO
15 was thinking, but that's what the CEO said.

16 So I'd like to move on to standing about class
17 claims. I think those arguments about no standing to
18 represent a class, they're premature at the pleading
19 stage. I think in the First Circuit you're going to see
20 that there's case law that says, number one, a motion to
21 strike class claims are drastic in disfavor of a remedy
22 at this juncture, and those arguments should be taken up
23 after the plaintiffs had an opportunity to take some
24 discovery and make a class certification motion.

25 We cited First Circuit authority for that

1 point, including the decision in College of Dental
2 Surgeons of Puerto Rico versus Connecticut General Life
3 Insurance Company, 585 F.3d 33.

4 Plaintiff also has standing to bring claims on
5 behalf of a nationwide or at the very least a
6 multi-state class. He alleged a common course of
7 conduct resulting in the same type of injury for
8 everyone in the putative class, and class treatment
9 would therefore be appropriate.

10 In our briefing we argue that plaintiff will
11 be able to certify a nationwide class by applying New
12 Hampshire choice of law rules. I don't know if you want
13 me to talk about that now or --

14 THE COURT: No, you can respond to him when he
15 addresses it.

16 MR. MARCHESE: When he addresses it? Okay.

17 So I'll talk about the class definitions.

18 The defendant says they're overbroad.

19 Plaintiff needs some discovery to accurately pin down
20 the scope of the class. For example, helpful discovery
21 would include the exact date when the defendant changed
22 the design of the P320s. I don't have that now.

23 It would include the exact dates that the drop
24 safety claims were made and where they were publicized.
25 It would include details and timing about the

1 defendant's drop-fire testing itself and the results of
2 that testing. And using that evidence, the plaintiff
3 could tailor his class definitions in a motion to
4 certify a class, or the Court could alter a class
5 definition sua sponte, or the Court could even create a
6 subclass.

7 And so the right time to address those issues
8 about class definitions I think is at the class
9 certification stage and not at this juncture.

10 Regarding warranty claims, we sufficiently
11 plead warranty claims based on the stand-alone
12 representations by the defendant in their advertising
13 that the P320 pistols were drop safe and would not fire
14 unless intended. Those claims were not true because of
15 the design defect. We do not base our warranty claims
16 on Sig's limited lifetime warranty, which does not even
17 apply to design defects but rather to manufacturing
18 defects.

19 The plaintiff sufficiently pleads a claim for
20 breach of implied warranty of merchantability.

21 THE COURT: Is there any difference between a
22 warranty that a product is defect-free and a warranty
23 that it will perform at a certain level, or is that just
24 the way it's pleaded?

25 MR. MARCHESE: So I think you're talking about

1 the Mag-Moss. Those are different. There are two
2 prongs under Mag-Moss, and one prong is the free of
3 defects prong.

4 The other prong is about a specified time and
5 a specified level. We're not talking about the
6 specified time and a specified level.

7 THE COURT: You're talking about defect-free.

8 MR. MARCHESE: They said drop safe, and so
9 we're talking about defect-free.

10 THE COURT: Okay. Yeah.

11 MR. MARCHESE: So under breach of implied
12 warranty we sufficiently allege that the guns were not
13 of fair average quality. Indeed, the United States Army
14 found them to be deficient and required them to be fixed
15 before providing them to our soldiers.

16 Mag-Moss we just talked about. You know, we
17 think that notice was sufficiently given prior to filing
18 the complaint, and I'd like the Court to note that the
19 Army notified Sig of this issue in 2016. I mean, I'd
20 say that's actual notice for years. So that's adequate
21 notice in the class context.

22 The defendant had ample time to cure but they
23 haven't taken steps to do so, and that's what Judge
24 Rosenthal ruled also when that same argument was made to
25 her in the Gordon case in Texas.

1 And we did provide a notice letter, you know,
2 prior to the filing of the complaint. I'm not sure if
3 that was said by my adversary.

4 Unjust enrichment. The First Circuit has
5 recognized a plaintiff's right to plead a claim for
6 unjust enrichment in the alternative to contract-based
7 claims, and we cited the Lass v. Bank of America case,
8 695 F.3d 129. It's First Circuit, 2012. And thus, the
9 plaintiff's warranty and unjust enrichment claims should
10 move forward simultaneously.

11 The defendant did not move to dismiss Count 5,
12 fraudulent concealment; Count 6, fraud; or Count 7, the
13 Arizona consumer protection statute claim. So I would
14 argue that those claims should all move forward past the
15 pleading stage, and I would also object to the Court's
16 consideration of the cases about Arizona warranty law
17 that --

18 THE COURT: Privity cases.

19 MR. MARCHESE: Yeah, that the defendant
20 e-mailed me yesterday when I was on the plane and didn't
21 put in any of the briefs. So I'd like the Court -- I'd
22 like the Court not to consider those because they didn't
23 make it into any of the briefing.

24 THE COURT: I'll put it to you this way. I
25 have the cites. I'm going to take a look at them.

1 Should I decide to consider them, I'm going to give you
2 an opportunity to respond.

3 MR. MARCHESE: Okay. I mean, what I did see,
4 I think those were summary judgment cases, your Honor.
5 We're at the motion to dismiss stage. And I think those
6 cases are also about, like, a limited warranty that that
7 defendant had, but our client's claims are not about,
8 you know, are not about Sig's limited liability
9 warranty. They're about the freestanding
10 representations about drop safety that the defendant
11 made all over its website and marketing material.

12 THE COURT: Looking ahead at the class
13 certification, though, do you have a makeable case --
14 have you pleaded a makeable case for fraud on a common
15 classwide basis?

16 MR. MARCHESE: I think I did, and I'm going to
17 tell you why.

18 THE COURT: Okay. That's my question.

19 MR. MARCHESE: So I gather you're talking
20 about reliance, right?

21 So I believe, and I cited some cases to you
22 where nationwide fraud claims have been certified in
23 consumer class actions. My firm did two of those.
24 That's Ebin v. Kangadis, I don't have the cite but it's
25 in the briefs, and Hart versus B -- I think it's BHH,

1 LLC. Hart is spelled H-A-R-T. And one case was about
2 olive oil, another case was about bug repeller, but the
3 essence of what those cases say is that, you know, when
4 you have misrepresentations that are so central to a
5 product that reliance must be presumed because of the
6 centrality of the misrepresentations in a consumer
7 context, and here I would argue that the drop safety,
8 the gun safety representations are those types of
9 representations, are those types of claims. So that
10 reliance can be effectively applied on a classwide
11 basis. That's my argument.

12 You may have to -- that's it in a nutshell.

13 THE COURT: I got it.

14 MR. MARCHESE: All right. The New Hampshire
15 Consumer Protection --

16 THE COURT: Besides here and Texas, are there
17 any other Sig P320 cases out there, class?

18 MR. MARCHESE: Yes.

19 THE COURT: There are?

20 MR. MARCHESE: Yes.

21 THE COURT: Can you tell me?

22 MR. MARCHESE: Yeah, there's one called
23 Hartley.

24 THE COURT: What district?

25 MR. MARCHESE: Where is it?

1 MR. JOYCE: That is in Missouri, federal court
2 in Missouri.

3 MR. MARCHESE: Now, that case does not concern
4 the drop-fire defect. That's an out-of-battery
5 discharge case. And I understand from the public filing
6 that that case the parties have reached agreement for a
7 classwide settlement and applied for --

8 THE COURT: That's not your case then?

9 MR. MARCHESE: That's not my case. And I
10 think there's a motion for preliminary approval on that.

11 THE COURT: Counsel, are there any others out
12 there? Any other Sig gun --

13 MR. JOYCE: No other class action cases. That
14 was it.

15 THE COURT: Thank you.

16 MR. MARCHESE: So the New Hampshire Consumer
17 Protection Act. Defendant argues --

18 MR. FOLSOM: Do you want to hear from
19 defendants first on that?

20 THE COURT: I did want to hear from them
21 first.

22 MR. MARCHESE: Oh, okay. Sorry.

23 THE COURT: And I'll give you the last word on
24 it.

25 MR. MARCHESE: Very well.

1 MR. JOYCE: Your Honor, can I just very
2 briefly reply to a few of the things that he said?

3 THE COURT: Yes.

4 MR. JOYCE: So, I mean, first of all, as an
5 advocate, it's always hard to sit through motions to
6 dismiss where you have to hear things recited as if they
7 are facts and that are not, so I will be patient and
8 not --

9 MR. MARCHESE: I tried to stick to the
10 complaint.

11 MR. JOYCE: -- take up your Honor's time with
12 that.

13 But in the plaintiff's complaint, and then I'm
14 hearing plaintiff say that we have the voluntary upgrade
15 and says it has nothing to do with drop fire, that's
16 just not -- if you even look at the plaintiff's
17 complaint, that's just not even true.

18 If you look at paragraph 48 of the plaintiff's
19 complaint when they're citing our FAQs that support the
20 -- explain to folks what we're doing and why, what is
21 the P320 Voluntary Upgrade Program, you know, they say
22 we're offering this program. It says what we're doing.
23 Why is this upgrade happening? And it says right under
24 that that it meets the standards, but there's this
25 vulnerability that was found and we're going to fix that

1 for you.

2 So it's just not true. Even if you look at --
3 take all the plaintiff's complaint allegations as true,
4 which you have to, it's not even consistent with their
5 own pleading. When they're saying that corporate
6 representatives said the upgrade had nothing to do with
7 drop safety, they're talking about the addition of a
8 mechanical disconnecter, which is described at paragraph
9 15 in the complaint, and they say the mechanical
10 disconnecter, which is another change that Sig made to
11 improve the trigger performance, that had nothing to do
12 with the voluntary upgrade because that was true, it
13 didn't -- rather, with the drop safety.

14 So we said, we changed these parts and that
15 has to do with the drop safety. We changed the
16 mechanical disconnecter, and that had nothing to do with
17 the drop safety but we're adding it because we think it
18 improves the performance of the gun. So that's what
19 he's referring to.

20 And then if you look at page 15 of his
21 complaint, you'll see that that comment correlates
22 expressly with the mechanical disconnecter.

23 With respect to the standing issue, and
24 there's reference to the CSST case which talked about
25 speculative future injury, that case there was 145 or so

1 instances where lightning hit the CSST tubing. It's not
2 like some highly speculative thing that has never
3 happened before.

4 And then the seatbelts. The allegation, which
5 had to be taken as credible, was that there was a
6 propensity for these seatbelts to unlatch.

7 What's the difference between an understanding
8 which had to be accepted as true that there was
9 propensity for something to happen but it hasn't
10 happened in the marketplace yet? That's somehow totally
11 different?

12 There is a potential risk in both those
13 instances of future harm that hasn't happened to the
14 plaintiff and in neither of those cases do we have
15 what's here, which of course is the Voluntary Upgrade
16 Program, and they were dismissed anyway.

17 With respect to the claims that plaintiff is
18 claiming that somehow their warranty claims that they
19 mentioned, oh, we said it was drop safe and it was in
20 relation to existing standards, but assuming for the
21 sake of argument here that that is to be regarded as
22 offending contract, that goes to the reason for the
23 breach of the warranty. The warranty was I'm going to
24 give you a defect-free product.

25 And the plaintiffs conceded their warranty

1 that -- the warranty they're proceeding on is that there
2 was a defect; that the product was not free from defect.
3 That's exactly the express warranty that Sig gives, that
4 this product is free from defect, and what it says is,
5 if we screwed that up, if we make a mistake and give you
6 something with defect, this is what we will do. We will
7 repair or we will replace it if you bring it back to us.
8 That's it. And that's all the plaintiff gets here.

9 So when they're talking about these other
10 alleged damages under warranty period that the plaintiff
11 wants to proceed on, this speculative resale value, they
12 don't get that. That's not part of the limited
13 warranty. They get repair or replace. That's what they
14 signed up for, and that's exactly what Sig has already
15 provided this plaintiff.

16 It's telling that the one question that
17 plaintiff, who is obviously an able advocate, great on
18 his feet and a smart guy, the one question that he
19 really couldn't answer was why there's no there there.
20 Why did this person simply not return his firearm and
21 get it upgraded.

22 THE COURT: Outrage isn't going to do it.

23 MR. JOYCE: No. We don't think so under the
24 law, your Honor.

25 And then he says, well, plaintiff says, oh,

1 well, we want you to assume that there's four to six
2 weeks' delay in getting an upgrade done. First of all,
3 that's not true. But second of all, we'll never know
4 the answer to that one, your Honor, because Mr. Ortiz
5 never gave Sig a chance to do that and he has no
6 standing to make that argument.

7 So with that, I think I will sit down, your
8 Honor.

9 THE COURT: Let me just ask this question
10 before we get to that. And I mean this in a respectful
11 way, a deferential way, because it's a deferential
12 standard, right? I mean, what could be the scope of
13 damages here, like on a per gun basis? And you're a
14 professional at this game. I'm not. I handle three
15 class actions a year maybe, all right, and sometimes I
16 wonder about the math. You must have an idea. What are
17 you thinking?

18 MR. MARCHESE: I mean, the scope of damages --
19 I told you there are by my estimate 300,000 of these
20 that are on the market that -- there were 500,000 on the
21 market, but then there were 300,000 where I understand
22 probably have not got a voluntary upgrade. And there
23 are some, you know, there's some measure, you know, of
24 the purchase price. Like what is a gun that's
25 defective, you know, that has a drop-fire defect worth

1 to you compared to a gun that's safe?

2 THE COURT: Well, its worth to anybody. It's
3 whatever the cost is of the upgrade. Unless you don't
4 buy into the upgrade, but you haven't said that.

5 MR. MARCHESE: I'm sorry. I didn't hear you.

6 THE COURT: Unless you don't buy that the
7 upgrade wasn't effective, and you have not alleged that.

8 MR. MARCHESE: We have not alleged that.

9 THE COURT: So it's a question of loss of use
10 while the upgrade happens and I guess any diminution in
11 what you say is resale value.

12 I don't think the idea that -- the defendant
13 is not going to want to hear this, but I don't think the
14 idea that there's been a diminution in resale value,
15 even post-upgrade, is necessarily farfetched. I think
16 it's something that I can wrap my mind around. I don't
17 know how it plays out beyond 12(b), but it's something I
18 can wrap my mind around. But I'm just trying to do the
19 math and I'm just sort of curious about --

20 MR. MARCHESE: Look, some of that -- it really
21 does get into some kind of expert discovery, and I just
22 don't -- you know, I don't have that right now for you,
23 your Honor.

24 THE COURT: Understood. That's a straight
25 answer. Go ahead.

1 MR. JOYCE: Is that question being posed to
2 me, your Honor?

3 THE COURT: No, it wasn't. I know what your
4 answer is. It's somewhere around zero.

5 MR. JOYCE: Yeah. That's probably correct,
6 your Honor.

7 THE COURT: And I didn't mean that to be a
8 wise guy.

9 MR. JOYCE: I know, your Honor.

10 THE COURT: All right. Go ahead.

11 MR. FOLSOM: Thank you, your Honor. I'm going
12 to address two discrete issues here.

13 One of them is the New Hampshire choice of law
14 issue which was -- really arose in response to our, the
15 portion of our motion to strike the nationwide class
16 allegations, and then the second is the sufficiency of
17 the New Hampshire Consumer Protection Act claim.

18 On the choice of law, sitting in this forum,
19 the Court applies New Hampshire choice of law, and
20 really the question is what's the appropriate choice of
21 law test here --

22 THE COURT: Yeah.

23 MR. FOLSOM: -- under New Hampshire law. And
24 I should say here I'm focusing -- given that this arose
25 in the context of issues of predominance in terms of

1 questions of law, I'm focusing here on the claims that
2 sound in contract: the express warranty, implied
3 warranty, and then WA claims, and leaving aside the tort
4 claims for now.

5 With respect to the claims that sound in
6 contract, the appropriate test is the restatement of the
7 conflict of laws, and the issue is that you apply the
8 law of the state with the most significant relationship
9 to the contract. That's the law that's going to govern.

10 And there are a number of factors the
11 restatement looks to to determine what that state is:
12 place of contracting, place of negotiation, place of
13 performance, location of the subject matter of the
14 contract, domicile, residence, nationality, place of
15 incorporation of the parties. And here the purchase,
16 the contract, it occurred in Arizona.

17 I heard counsel say, and it's in their
18 complaint, that Mr. Ortiz purchased the P320 from a
19 firearms dealer in Arizona. And in terms of -- and
20 so -- this is where I would point to the two district
21 court cases that we cited in our briefs, Fenwick and
22 Payne, which were both factually similar to the
23 allegations here. Both class actions. Both putative
24 nationwide class actions. Both involving alleged
25 misrepresentations about the quality of a product.

1 And in both of those cases the courts found
2 that it was the state where the product was purchased
3 that had the most significant relationship to the
4 contract because that's where the consumer is buying the
5 product.

6 So in Fenwick you had a defective
7 cholesterol-reducing drug. As here, the defendant was a
8 company with its headquarters in the forum state. There
9 were alleged misrepresentations about the quality of the
10 product that emanated or came from the forum state, yet
11 the Court found that it was the home state of each
12 person who purchased the drug that had the most
13 significant relationship.

14 In Payne, defect in a camera, some aspect of a
15 camera memory. Again, advertising, marketing, sales
16 took place throughout the country, and as that Court
17 found, each state has the most significant relationship
18 with the individual transactions that took place in its
19 state. The breach of warranties existed at the time of
20 contract when the plaintiffs purchased the cameras in
21 the various states.

22 So they cite to cases from New Hampshire that
23 applied the Clark five-factor analysis which is more
24 appropriate for -- used in tort cases.

25 And they've cited to a district court case

1 here, the Caldwell case, but that was -- although the
2 warranties were involved in that case and breach of
3 warranties were alleged, that was really more of a
4 personal injury case. It was surgical mesh. The
5 plaintiff -- the named plaintiff had suffered physical
6 injuries and they were seeking personal injury type
7 damages, including compensatory damages, loss of
8 consortium, et cetera. In that case, the Caldwell case,
9 there was no discussion of whether the Clark factors
10 should apply or the restatement of conflicts factors
11 should apply.

12 If the Court has any questions on the choice
13 of law -- okay, I'll move on to the New Hampshire
14 Consumer Protection Act.

15 As the Court knows, our argument on the New
16 Hampshire CPA is the territoriality argument. You have
17 a case here where the plaintiff received the alleged
18 misrepresentations in Arizona, or at least that's the
19 fair reading of the complaint. He purchased the gun in
20 Arizona. There's no allegation that these statements
21 from Sig Sauer were received by him anyplace other than
22 where he resides.

23 The cases from this court applying New
24 Hampshire law make it clear that where there are alleged
25 misrepresentations involved, the offending conduct is

1 where the alleged misrepresentations were received.
2 This is the BAE Systems case. The Enviromatics case.

3 In Enviromatics you had a Virginia company who
4 was the defendant. They shipped product to a plaintiff
5 in New Hampshire, so you have a New Hampshire plaintiff,
6 together with materials containing the alleged
7 misrepresentations. And there the Court found there was
8 a New Hampshire CPA claim because the deceptive act of
9 misrepresenting the condition of the product occurred in
10 New Hampshire when Enviromatics, the plaintiff, received
11 the pump and its allegedly false documentation.

12 So it's the act of receiving the statements or
13 the alleged misrepresentation that is the key here,
14 which makes sense. I mean, if you, you know, have a
15 generalized statement emanating from a certain place, in
16 order to have a claim under the CPA that there's been a
17 misrepresentation you need someone receiving that
18 misrepresentation.

19 Unless the Court has questions on that
20 front --

21 THE COURT: I'm good. I understand your
22 argument.

23 Give me one moment, actually. Hold on a
24 second.

25 If I find standing, are you still moving to

1 dismiss all these claims? Right? Does that matter to
2 your motion to dismiss all these claims?

3 MR. JOYCE: I think I'd better address that
4 one. If you find standing --

5 THE COURT: Counts 5, 6 and 7, right, the
6 Arizona consumer fraud.

7 MR. JOYCE: -- all the warranty claims would
8 still be gone under Arizona law.

9 THE COURT: But the tort.

10 MR. JOYCE: The fraud claims would still --

11 THE COURT: I think they survive.

12 MR. JOYCE: -- exist, but the New Hampshire
13 consumer fraud statute would not.

14 THE COURT: All right. Either of you can
15 answer this.

16 One thing we spent some time looking for was
17 case law on Arizona Consumer Fraud Act and what the
18 pleading standard is there. Is it sort of a Federal
19 Rule 8 or a Federal Rule 9? Does anybody know?

20 MR. JOYCE: Yeah, I believe that that would be
21 -- since it's a fraud-based misrepresentation statute it
22 has to be the heightened pleading standard that applies.

23 THE COURT: Is there any case law for that?

24 MR. JOYCE: I can supply that. Perhaps both
25 sides could address that in a short one-page letter to

1 the Court.

2 But I have some case law that I think you
3 would want to take a look at, the Sellinger versus
4 Freeway Mobile Home Sales, 110 Arizona 573.

5 THE COURT: 110 Arizona 573?

6 MR. JOYCE: Yes. I think that that outlines
7 the private cause of action for consumer fraud under
8 Arizona law. I think that might be a helpful cite.

9 THE COURT: All right.

10 MR. JOYCE: But among other things, that
11 requires injury. One of the things the plaintiff said
12 is we didn't move to dismiss certain causes of action,
13 but of course we did because we attacked standing and
14 that goes to everything.

15 THE COURT: That covers the case.

16 If I want more law on the pleading standard
17 under the Arizona Consumer Fraud Act, I'll let you know.

18 All right. Go ahead and respond.

19 MR. MARCHESE: So we argue that the plaintiff
20 will be able to certify a nationwide class by applying
21 New Hampshire choice of law rules. Under New Hampshire
22 law a choice of law analysis is only necessary when a
23 New Hampshire law actually conflicts with another
24 state's law.

25 So we contend that New Hampshire law can be

1 applied across the board, especially for claims where
2 there are no meaningful differences between state laws,
3 such as the unjust enrichment and the fraud or
4 fraudulent concealment claims. But even for claims
5 where there are meaningful differences between the state
6 laws, plaintiff argues that New Hampshire's choice of
7 law rules would dictate applying New Hampshire law
8 across the board.

9 We suggest using the five-factor test laid out
10 in Caldwell. This case is, you know, it's got some
11 fraud claims, tort-based claims, unjust enrichment,
12 consumer protection, and some warranty. We would
13 suggest that the Caldwell five-factor test would be the
14 test that the Court should use.

15 It would simplify the judicial task before the
16 Court to apply New Hampshire law across the board, and
17 it would also advance New Hampshire's governmental state
18 interests here, which are substantial given that the
19 defendant is based in New Hampshire and all the alleged
20 misconduct took place in and emanated from New
21 Hampshire. The manufacture and design of the guns, all
22 of the representations about drop safety, any of the
23 efforts to misdirect consumers about what the Voluntary
24 Upgrade Program is really about, all of that emanated
25 from New Hampshire.

1 Moreover, New Hampshire law supports very
2 sound policies for warranty claims, do not require
3 privity with the manufacturer or reliance, and so based
4 on a choice of law analysis New Hampshire law should be
5 applied nationally. Even if the Court rules that the
6 laws of the various states should apply, however, the
7 plaintiff can still certify multi-state classes that
8 include consumers from different states that have
9 similar laws.

10 Regarding the New Hampshire Consumer
11 Protection Act, the defendant argues that the
12 plaintiff's New Hampshire Consumer Protection Act fails
13 because there was no offending conduct that took place
14 in New Hampshire, but that's wrong.

15 First, I would just note that there's no state
16 residency requirement for bringing suit under the New
17 Hampshire Consumer Protection Act.

18 THE COURT: Right.

19 MR. MARCHESE: Second, the definition of trade
20 and commerce under the act encompasses advertising or
21 offering for sale anything of value wherever situated.
22 Wherever situated, not just in New Hampshire.

23 And third, the plaintiff has cited cases
24 supporting his argument that the statute applies to
25 offending conduct that takes place in New Hampshire.

1 We cited the Muller and the Pacamore case. So
2 under the act the location of the misconduct is the
3 determinative question. The act applies if the
4 offending conduct took place in New Hampshire, like it
5 did here. Again, the faulty design of the guns, the
6 marketing claims about the drop safety, and the cover-up
7 of the design defect all occurred in New Hampshire. In
8 the Gordon case the defendant admitted that all of those
9 things occurred in New Hampshire and we cited that in
10 our brief. So this claim should survive.

11 And moreover, we allege that -- we've alleged
12 that the defendant's misrepresentations were
13 disseminated on their website and on uniform marketing
14 materials which were obviously also received in New
15 Hampshire, too.

16 That's all that I have for now, your Honor.
17 Do you have any questions?

18 THE COURT: No.

19 MR. MARCHESE: All right. Thank you.

20 THE COURT: I'm good. Just give me a moment
21 and let me check my notes here.

22 Talk to me about the difference of the scope
23 of discovery in this case. Both sides, please. If we
24 have nationwide claims on top of Ortiz's individual
25 claims, how does discovery look different? I know it

1 looks different, but how? Could you describe that?

2 MR. MARCHESE: I honestly don't think it's
3 going to look that different. You know, maybe we would
4 need like sales figures or something like that for the
5 nationwide sales as opposed to, you know, broken out by
6 state, but that's, you know, that's not hard to do.

7 I really don't think that the discovery would
8 look very different. I mean, what would we need? We
9 just need the advertising about the drop safety claims,
10 documents relating to the testing for drop fires,
11 documents relating to the voluntary upgrade, documents
12 relating to the design and manufacture of the guns and
13 any changes that they made to the design after 2017.

14 I don't really think it's going to differ that
15 much to be honest, your Honor, so I don't think
16 there's -- you know, this whole thing about, oh, it's
17 going to be such a big undertaking now that the
18 nationwide claims are in, that's just not true.

19 THE COURT: What do you say?

20 MR. JOYCE: Well, first of all, I hope you
21 have a couple of resources to hire a couple other
22 clerks, because we're going to be arguing 50 different
23 states' laws on some of these causes of action.

24 THE COURT: But that's my problem, not yours,
25 right?

1 MR. JOYCE: Well, it is our problem, too,
2 because we're going to be briefing with my friend over
3 there, plaintiff's counsel, as to whether we agree
4 whether the laws are identical or not and what they are.
5 So it adds a substantial burden to the case, so -- and
6 that's with respect to -- I mean, you have to go through
7 the individual claims, too, in determining whether they
8 require reliance and then it becomes impossible, so
9 whenever reliance is a factor you can't have a class
10 action. There's no commonality.

11 THE COURT: Thank you.

12 All right. Gentlemen, I appreciate your
13 submissions. I anticipate getting an order out here
14 pretty quickly. I think I know what I want to do, but I
15 want to look at a couple issues you raised today.

16 I am not likely to get into the whole privity
17 issue under Arizona law, but if I do, you'll be given an
18 opportunity to say something about it, all right?

19 MR. MARCHESE: Yes.

20 MR. JOYCE: Your Honor, let me just say one
21 thing on that.

22 THE COURT: Yeah.

23 MR. JOYCE: The Court's going to have to
24 address that sooner or later --

25 THE COURT: True.

1 MR. JOYCE: -- because it's going to come up
2 on summary judgment, right?

3 THE COURT: You're absolutely right.

4 MR. JOYCE: So I think we should -- if I can
5 respectfully suggest that we do tackle it, and if the
6 plaintiff wants an opportunity to respond to that, the
7 Court take that, and then let's just -- you know, again,
8 it's not an issue that's going to go away. It's front
9 and center.

10 THE COURT: You're right. Here's the problem.
11 It's not an issue that's going to go away, but I'm going
12 to go away Wednesday night for a month to try a case in
13 Puerto Rico so it might be later. I take the
14 suggestion. I appreciate the spirit in which it's
15 offered, it's not a bad idea, but I've got to give it
16 some thought.

17 MR. JOYCE: Understood. Thank you.

18 THE COURT: All right. I appreciate the
19 presentations and I'll get an order out here shortly.

20 We're adjourned.

21 (Conclusion of hearing at 4:28 p.m.)
22
23
24
25

C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 3-3-20

/s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR